

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DIRECT RESPONSE MEDIA,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 99-2645
FALL LINE ENTERTAINMENT, INC.	:	
and	:	
JOSEPH R. FRANCIS	:	
	:	
Defendants.	:	
	:	

MEMORANDUM AND ORDER

BUCKWALTER, J.

October 20, 1999

Presently before the Court is the Defendant Joseph R. Francis' Motion to Dismiss for Lack of Personal Jurisdiction, or in the alternative, Motion to Transfer Venue. For the reasons stated more fully below, the Motion is denied in its entirety.

I. Factual Background

This action alleges breach of contract by Plaintiff Direct Response Media, Inc. ("Plaintiff" or "DRM") against Defendants Fall Line Entertainment, Inc. ("Fall Line") and Joseph R. Francis ("Francis"), as well as fraud against Francis only. The action was commenced on May 21, 1999 with the filing of the Complaint. DRM is a Pennsylvania corporation, Fall Line is a California corporation, and Francis is a California resident. This Court has subject matter

jurisdiction based on the diversity of the parties and the amount in controversy exceeds \$75,000, as required by 28 U.S.C. § 1332.

On March 23, 1998, DRM and Fall Line entered into the Media Placement Services Agreement (the “Agreement”). Maria Eden (“Eden”), DRM’s president, and Francis, Fall Line’s president, signed the Agreement on behalf of the two corporations. The Agreement required DRM to “book advertisement slots and pay television stations for the advertisements of the Defendants”. Compl. ¶ 13. Between March 30 and November 23, 1998, DRM prepared and tendered invoices which detailed the services performed and the amounts owed by Fall Line. Compl. ¶ 14. The primary services provided by DRM were with regard to Fall-Line’s “Banned from Television” and “Prison Files” videos.¹ The Plaintiffs allege that the Defendant failed to pay the required amounts due, while Francis continually asserted that DRM would be paid for its services.

A motion to dismiss for lack of personal jurisdiction requires a court to consider the contacts alleged between the forum state (Pennsylvania) and the defendant. The contacts between Defendant Francis, as a representative of Fall Line, and Pennsylvania are as follows:²

- 1) In early 1998, Francis initiated contact by telephone with DRM’s offices, located in Wayne, Pennsylvania.
- 2) On March 12, 1998, Francis sent correspondence to DRM in Pennsylvania, appointing it as an “agency of record” for Fall-Line.

¹ The Complaint states that the Defendants made some payments for both of the videos. After assessing late charges and removing discounts worked into the original invoices, DRM contends that the current amounts due are \$437,148 with regard to “Banned from Television” and \$9,517 for “Prison Files”.

² See, Eden Aff. ¶¶ 4-15.

- 3) On both April 9 and June 29, 1998, Francis met with Eden and other DRM employees to discuss aspects of the “Banned from Television” promotion.
- 4) Francis had almost daily contact with DRM employees in Pennsylvania during the time the business relationship existed between the parties.
- 5) All work performed by DRM in relation to the Agreement was conducted in Pennsylvania.
- 6) All payments made to DRM by Fall Line were sent to Pennsylvania.

II. Personal Jurisdiction

A. Legal Standard.

Once a defendant raises a personal jurisdiction defense, the burden of establishing the court's jurisdiction rests with the plaintiff. Provident Nat. Bank v. Cal. Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir.1987). Prior to trial, however, a plaintiff need only make a prima facie showing of jurisdiction. Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir.1992). Factual disputes created by the affidavits, documents and depositions submitted for the court's consideration are resolved in favor of the non-moving party. Friedman v. Israel Labour Party, 957 F.Supp. 701, 706 (E.D.Pa.1997).

The Defendants do not contest in this motion the assertion of jurisdiction over Fall Line.³ Their argument is that since Francis, in his individual capacity, has no contacts with the forum, any exercise of jurisdiction over him would be unconstitutional. However, some courts have recognized that jurisdiction over a corporate officer, who has been personally involved in a corporation's tortious conduct, may be exercised by a federal court which would be able to

³ The Defendants admit in their answer the validity of the Court's exercise of jurisdiction over Fall Line.

exercise jurisdiction over the corporation itself. See, Hough/Loew Associates, Inc. v. CLX Realty Co., 760 F.Supp. 1141 (E.D. Pa. 1991). Therefore, this Court will first look to see whether jurisdiction would be proper over the Defendant Fall Line. If the basis for jurisdiction is sufficient, it will then analyze whether Francis’ participation in the alleged conduct will likewise subject him to personal jurisdiction.

The extent to which a court may exercise personal jurisdiction differs depending upon whether a court seeks to exercise general or specific jurisdiction over a non-resident defendant. See Mellon, 960 F.2d at 1221. General jurisdiction permits a court to exercise personal jurisdiction over a non-resident for non-forum related activities when the defendant has engaged in “systematic and continuous” activities in the forum state. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16 (1984). If the defendant has not had such contact in the forum state, then a court may exercise specific jurisdiction over a non-resident defendant only for forum-related activities. The defendant must have had “minimum contacts” with the forum state that are related to the activities that form the basis of the suit. See, International Shoe Co. v. Washington, 326 U.S. 310 (1945); Mellon, 960 F.2d at 1221.

Under Federal Rule of Civil Procedure 4(e), this Court may exercise specific personal jurisdiction over non-resident defendants to the extent permitted by Pennsylvania’s long-arm statute, 53 Pa. C.S.A. § 5322.⁴ In addition to the enumerated bases of jurisdiction

⁴ In shortened form, the statute provides that: A tribunal of this Commonwealth may exercise personal jurisdiction over a person who acts directly or by an agent, as to the cause of action or other matter arising from such person:

- (1) Transacting business in this Commonwealth
 - (2) Contracting to supply services or things in this Commonwealth
 - (3) Causing harm or tortious injury by an act or omission in this
- (continued...)

under § 5322(a), Pennsylvania's long-arm statute also allows a court to exercise personal jurisdiction over a non-resident defendant to the "constitutional limit", or the fullest extent allowed under the Due Process Clause of the Fourteenth Amendment of the Constitution. See 42 Pa. C.S.A. § 5322(b).

Specific jurisdiction may be exercised when the cause of action arises out of the defendants' contacts with the forum. Mellon Bank, 960 F.2d at 1221 ; see 42 Pa. C.S.A. § 5322(a)(1994). In order to exercise specific jurisdiction, there must be " 'some act by which the defendant purposefully availed itself of the privilege of conducting business in the forum state, thus invoking the benefits and protections of its laws.' " Id. (*quoting* Hanson v. Denckla, 357 U.S. 235, 253 (1958)). Further, the contacts between the defendant and the forum must be such that " 'he should reasonably anticipate being haled into court there.' " Id. (*quoting* World-Wide Volkswagen, Corp. v. Woodson, 444 U.S. 286, 297, (1980)). After analyzing the minimum contacts, the court "may next inquire whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " Id. (*quoting* International Shoe, 326 U.S. at 320).

B. Discussion:

⁴(...continued)

Commonwealth.

- (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

(1) Jurisdiction over Fall Line

The Court finds that Fall Line's contacts with the forum are not sufficient to subject it to general jurisdiction. The systematic and continuous test is not easy for a plaintiff to prove. Fall Line has no office or employees in Pennsylvania. While the company has been alleged to have had direct telephone contact with DRM's offices on a daily basis over much of the relevant time period, this does not rise to the level of systematic contacts. Otherwise, it seems that Fall Line, through its representative Francis, has only made two appearances in Pennsylvania and directed some payments to DRM within the Commonwealth. Since exercising general jurisdiction would allow a court to hale an out-of-state defendant in front of it on even non-forum related matters, such an assertion here would be manifestly unfair.

However, Fall Line's contacts with Pennsylvania are enough to support specific jurisdiction. The standard which must be met when asserting specific personal jurisdiction over a non-resident defendant is that 1) the non-resident must have sufficient minimum contacts with the forum state and 2) the assertion of jurisdiction must comport with fair play and substantial justice. See, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1987). To assert specific jurisdiction, the cause of action must be related to the defendant's contacts with the state and the defendant's actions must either fall within one of the enumerated sections of the long-arm statute or meet the minimum contacts analysis. Although our Court of Appeals has recognized that merely contracting with a resident of the forum alone will not be sufficient to establish specific jurisdiction, they have also recognized that "the requisite contacts may be supplied by the terms of the agreement, the place and character of prior negotiations, contemplated future consequences, or the course of dealings between the parties." Mellon Bank, 960 F.2d at 1223

(citing Burger King Corporation, 471 U.S. at 479), . For example in Carteret Savings Bank, F.A. v. Shushan, 954 F.2d 141 (1992), the Third Circuit determined that there were sufficient contacts to maintain specific jurisdiction over a Louisiana real estate developer where the defendant made telephone calls and sent correspondence into New Jersey from Louisiana and where there was a meeting in New Jersey to facilitate the closing of a loan. See also, Grand Entertainment Group v. Star Media Sales, 988 F.2d 476 (3d Cir.1993)(finding sufficient contacts for specific jurisdiction where corporate defendant directed twelve communications to the forum, engaged in negotiations that would create rights and obligations in the forum, and initiated contacts with Pennsylvania over the telephone and through the mail).

In the present action, the relatedness prong of a specific jurisdiction analysis is met because DRM alleges a breach of contract and all of Fall Line's contacts with Pennsylvania are related to this contract. Fall Line has also made sufficient contracts within the forum to allow the court to exercise specific jurisdiction. For example, transacting business in Pennsylvania, which includes the doing of "a single act for the purpose of realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts", can be a basis of personal jurisdiction in Pennsylvania. § 5322(a)(1)(ii). Francis' two meetings with Eden, his many telephone conversations regarding the Agreement with DRM personnel in Pennsylvania and his direction of payment and correspondence to DRM's offices would fulfill the statute's requirements. According to Eden's affidavit, the parties discussed the transition of "Banned from Television" to DRM and the parties' hopes for future transactions at these meetings. Even if such contacts would not qualify as "transacting business" for long arm

purposes, they would be sufficient to allow the court to exercise jurisdiction under the “constitutional maximum” provision.

However, under both the enumerated long-arm provision discussed above and the constitutional maximum provision of § 5322(b), the assertion of personal jurisdiction must still comport with fair play and substantial justice. *Id.* This broad requirement generally means that the defendant’s contacts with Pennsylvania must be of such a nature that the defendant could reasonably expect to be haled before a Pennsylvania court. *See, Kubik v. Letteri*, 532 Pa. 10, 19-20 (1992). Fall Line should have expected that it would have to appear before a Pennsylvania court if a dispute arose concerning the Agreement. All contact with DRM involved phone calls, correspondence and payments to DRM in Pennsylvania. The Agreement itself states that it will be governed by and construed under the laws of Pennsylvania. *See*, Compl. Exh. A. Front Line, through its President, Francis, found it reasonable to travel to Pennsylvania to discuss business under the contract. It should come as no surprise that the other party to the Agreement, a Pennsylvania corporation, would bring this action arising out of the contractual dispute in a Pennsylvania forum. Therefore, this Court finds it has personal jurisdiction over Defendant Fall Line, as the corporation had sufficient contacts with Pennsylvania and could reasonably anticipate being haled in front of a court within the Commonwealth.

(2) Personal Jurisdiction over Francis:

Generally, a court can not assert jurisdiction over a non-resident defendant whose only contacts with the forum state are based on the defendant’s role as a corporate officer. *See, National Precast Crypt Co. v. Dy-Core of Pennsylvania, Inc.*, 785 F.Supp. 1186, 1191 (M.D. Pa. 1992) (*quoting Bowers v. NETI Technologies, Inc.*, 690 F.Supp. 349, 357 (E.D. Pa. 1988)).

However, when a corporate officer participates to a significant extent in the alleged tortious conduct of the corporation, then personal jurisdiction over the defendant in his individual capacity may be appropriate. See, Maleski by Taylor v. DP Realty Trust et al., 653 A.2d 54 (Commonwealth Court 1994). A court should consider such factors as the officer's role in the corporate structure, the quality of the officer's contacts with the forum and the extent of the officer's participation in the challenged tortious conduct. Id. at 62; Elbeco Inc. v. Estrella de Plato, Corp., 989 F.Supp. 669, 676 (finding jurisdiction over individual defendants who had made misrepresentations to a Pennsylvania corporation through mail and telephone, as well as oral misrepresentations while in the Commonwealth); see also, Beistle Co. v. Party, U.S.A., Inc., 914 F.Supp. 92, 96 (M.D. Pa. 1996) (personal jurisdiction exercised over president who performed all duties of the corporation and had responsibility for distribution of the infringing product).

Under the factors outlined in Maleski, this Court asserts jurisdiction over Francis. In this case, the "officer" is alleged to be the sole director of the corporation. Francis may also be the sole employee of Front Line. The only employee of Front Line mentioned in connection to the negotiation or performance of the contract is Francis. The corporation's contacts with the forum have previously been deemed to be sufficient to support an exercise of jurisdiction. The Plaintiff also alleges that Francis committed fraud by promising to, but not actually paying for DRM's services, while still accepting the benefits of these services. The only allegations of fraud concern Francis' actions and statements. While Francis contests several of DRM's assertions and denies acting with fraudulent intent, factual allegations are to be resolved in favor of the non-movant at this stage of the proceedings. Factual disputes created by the affidavits,

documents and depositions submitted for the court's consideration are resolved in favor of the non-moving party. Friedman, 957 F.Supp. at 701. Since DRM has successfully plead that Francis' participation was central to the alleged tortious activity in the present action, it is fair to assert jurisdiction over him in his individual capacity.

III. Change of Venue:

Defendant Francis requests that this action be transferred to the Central District of California in the event that his motion to dismiss is denied. Before ruling whether a transfer of venue would be proper, the Court will determine whether the Eastern District of Pennsylvania is a proper venue for this action. The general venue statute provides; "A civil action wherein jurisdiction is founded only on diversity of citizenship may . . . be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, . . . or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." 28 U.S.C. § 1391(a).

The Plaintiff's choice of forum in the Eastern District of Pennsylvania is correct under 28 U.S.C. § 1391(a)(2). The test for determining whether venue is proper is not the defendant's contacts with a particular district, but rather the location of those events or omissions giving rise to the claim. See, Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994). The failure of Defendants to pay the required amount under the contract occurred in Pennsylvania. DRM provided its contractual services for Fall Line within the Commonwealth. Francis' allegedly fraudulent promises to pay occurred were either made in Pennsylvania during

the meetings with DRM personnel or were received by DRM in the Commonwealth. Therefore, the Plaintiff's choice of forum in the Eastern District of Pennsylvania was correct under 28 U.S.C. § 1391(a)(2).

A district court may transfer the venue of any civil action for the convenience of parties and witnesses or in the interests of justice, to any other district where it might have been brought. § 1404(a). Although § 1404(a) gives a district court the discretion to decide a motion based on a individualized case by case basis consideration of convenience and fairness, such motions are not to be liberally granted. Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1987). The first step in a court's analysis of a transfer motion is to determine whether venue would be proper in the transferee district. In a diversity case, venue is proper in a district in which any defendant lives if all defendants are from the same state. 28 U.S.C. §1391(a)(1). In this case, both Francis and Fall Line both have California citizenship. Since they are the only defendants, the Central District of California, which encompasses Los Angeles, would be a proper venue.

The second part of the analysis requires a balancing of the interests of justice and the convenience of witnesses and parties. Factors to be considered in determining whether to transfer venue include (1) plaintiff's choice of forum, (2) defendant's preference, (3) where the claim arose, (4) convenience to the parties as indicated by their relative physical and financial condition, (5) convenience to the witnesses to the extent that they may actually be unavailable for trial in one of the fora, (6) location of books and records, to extent they could be produced only in alternative forum, (7) practical considerations that could make the trial easier, more expeditious, or less expensive, (8) congestion of the possible fora, and (9) the familiarity of the

trial judge with the applicable state law in diversity cases. See, IMS Health, Inc. v. Vality Technology, Inc., 1999 WL 587629 at *13. (E.D. Pa. July 28, 1999).

First, it is important to note that the party moving to transfer a case on grounds of inconvenience has burden of showing that the existing forum is inconvenient. Britamco Underwriters v. Raymond E. Wallace Productions, Inc., 56 F.Supp.2d 542, 545 (E.D. Pa. 1999) (Joyner, J.). Francis main argument for the inconvenience of Pennsylvania as a forum is that the issue to be decided is whether Fall Line's corporate veil can be pierced. See, Def. Mem. in Supp. p. 6. He asserts that as this is a question of California law requiring witnesses and documents located in the vicinity of Los Angeles, deciding the issues in Pennsylvania would require unnecessary expense and travel. It is possible that the issue of "piercing the corporate veil" may become important later in this case if DRM attempts to recover from either or both the Defendants. However, this action currently consists of claims for breach of contract and fraud. By the terms of the contract, these are issues of Pennsylvania law, requiring the testimony of witnesses from Pennsylvania.

An analysis of the nine factors outlined above weighs in favor of denying Francis' motion. The plaintiff's choice of forum is a paramount consideration that should not lightly be disturbed. See, First Union National Bank v. United States, 55 F.Supp. 2d 331, 332 (E.D. Pa. 1999) (*quoting* Sovereign Bank, F.S.B. v. Rochester Community Savings Bank, 907 F.Supp. 123, 126 (E.D. Pa. 1995) (denying motion to transfer even though plaintiff filed in a district which was not his home nor the situs of events in contention). It should be noted, however, that the plaintiff's choice of forum is entitled to less weight where the plaintiff chooses a forum that is neither his home nor the situs of the occurrence upon which the suit is based. See, Jordan v.

Delaware & Hudson Railway Co., 590 F.Supp. 997, 998 (E.D. Pa. 1984). In First Union, the court denied a motion to transfer even though the plaintiff chose a forum that was neither his home nor the situs of operational facts. 55 Supp.2d. at 333. Therefore, when a plaintiff chooses its home state as the forum, as does DRM here, the choice is entitled to even greater deference.

The breach of contract and fraud claims arise out of the Agreement to provide services in Pennsylvania. The substantive claims by DRM will be decided by Pennsylvania law, in which this Court is well versed. The Defendant's preference factor obviously weighs in favor of granting the motion. The convenience of witnesses and parties and the location of records weigh in favor of remaining in Pennsylvania. Francis has mentioned the need for California witnesses, but has not spelled out with particularity who they would be. A defendant seeking transfer of a case must show the proposed alternative forum is not only adequate, but also more convenient than the present forum. See, Lawrence v. Xerox Corp., 56 F.Supp. 2d. 442, 451 (E.D. Pa. 1999). While it may be inconvenient for Francis to remain in California, it would be no less inconvenient for DRM to go to California. Also, Francis does not indicate any particular hardship in transporting to Pennsylvania documents required to defend himself. Therefore, after balancing the various factors involved, the Court finds that the interest of justice and convenience of the parties do not require a transfer of venue.

This Court properly asserts personal jurisdiction over the Defendant Francis and will not transfer the case to the Central District of California. Therefore, Defendant Francis' Motion is denied in its entirety.

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DIRECT RESPONSE MEDIA,	:	
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Plaintiff,	:	
	:	CIVIL ACTION
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	:	NO. 99-2645
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and	:	
JOSEPH R. FRANCIS,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 20th day of October, 1999, upon consideration of Defendant Joseph R. Francis's Motion to Dismiss, or in the Alternative, to Transfer Venue (Docket No. 3), Plaintiff's Response thereto (Docket No. 12), Defendant's Reply (Docket No. 13); it is hereby **ORDERED** that Defendant's Motion is **DENIED** in its entirety.

BY THE COURT:

RONALD L. BUCKWALTER, J.